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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SPRENGER, OLSON & SHUTES, P.A.
and DAVIS, MINER, BARNHILL & GALLAND,
Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT	1
CONCLUSION	10

TABLE OF AUTHORITIES

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 55 U.S.L.W. 5113 (June 26, 1987) 1, 6, 7, 9

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This supplement presents petitioners' view of the impact of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 55 U.S.L.W. 5113 (June 26, 1987) on the Petition for Writ of Certiorari.

This case is the logical next step for review after *Delaware Valley*. This case is representative of those in which an enhancement for risk must be awarded to attract competent counsel. The District Court and Court of Appeals reached their results for different reasons. But since both analyses are inconsistent with the standards set down in *Delaware Valley*, this case must be reversed in any event. Moreover, this is a particularly good case for consideration and explication of how a risk enhancement should be applied in a context where it ought to be applied and where petitioners introduced the necessary evidence with regard to relevant market considerations in the trial court.

This case is the kind of case Congress hoped would be brought. It was the largest pretrial race discrimination settlement in history and it secured unprecedented relief to a large class of black employees in an industry that historically has been tainted by segregated job opportunities.

Yet, this case would never have been brought without the incentive of a possible award of an enhanced fee for several reasons. First, it was too risky; the evidence is uncontradicted that the plaintiffs had less than a 50/50 chance of prevailing. Second, the case was too expensive. Lead counsel had to advance roughly one million dollars in costs (virtually none of which were objected to by defendants during the fee proceedings) to prosecute this case. Third, it was too time consuming. Two small firms spent over 17,000 hours of lawyer and paralegal time prosecuting this action. Fourth, because this case was brought in large part to secure classwide equitable relief, there

was no possibility of a contingency agreement being developed that would be attractive to counsel.

If an enhancement for risk is not required in such a case, no case like this will ever be brought. Petitioners actually proved just this in the fee proceeding. In the trial court petitioners submitted overwhelming and uncontradicted proof that competent counsel could not be induced to prosecute cases of this significance without an enhancement for risk.

Professor, now Judge, Easterbrook, after reviewing the risks and costs involved in this case, testified that a substantial enhancement was necessary here because:

> (1) in order to induce competent counsel to take difficult litigation of this sort, it is necessary to offer the prospect of fees that will make them at least as well off as if they worked at their market rates for clients who paid when billed . . .

And he concluded that this principle had special application in cases of this type:

> Often lawyers who work in risky cases can hedge their bets. The members of the plaintiffs' bars in antitrust and securities have found it possible to "syndicate" their cases. Each lawyer works on many cases at once; each case is staffed by teams of lawyers. This spreads risk. But the lawyers who work in the civil rights bars have not found the syndication of risk possible. For many reasons—and we are not sure we fully appreciate them, but they must include difficulties of conflicts of interest—the civil rights bar is organized into very small firms. The firms of lead counsel in this case are tiny compared with the 200-lawyer firms representing defendant. Worse for the risk problem, each lead counsel has sunk the bulk of his professional life for several years into this case. His fortune stands or falls on this application for fees. That is not a comfortable position.

> Nonetheless it seems to be a necessary one in civil rights litigation. When risk is not spread across many cases—when, as here, a litigator must put all his eggs in one basket, the need to multiply the gains in order to offset the losses is at its greatest. Thus we have no doubt about the propriety of a substantial multiplier in this case. (App. D-1-2, 16)[1]

Professor Easterbrook's testimony was supported by testimony placed before the District Court of witnesses who actively labor in the civil rights arena. Julius Chambers, Director-Counsel of the NAACP Legal Defense and Education Fund, testified:

> [I]t is my experience that cases such as this will not continue to be brought unless a substantial fee enhancement in the form of a multiplier is given in cases where the plaintiff is successful.
>
> . . .
>
> [I]t is already difficult to staff Title VII cases with experienced and competent lawyers in private practice. Indeed, I am aware of the existence of only a handful of firms nationwide who spend more than 50% of their time prosecuting contingent Title VII litigation.
>
> . . .
>
> [I]t is imperative if Title VII is to be enforced as Congress intended that substantial fee enhancements for risk and results be made in cases such as this to attract competent legal counsel. (Chambers Aff. pp. 2,4)

John E. Jacob, Chief Executive Officer of The National Urban League, stated:

> It is The League's experience that as a general matter there are not an adequate number of qualified and experienced plaintiff's civil rights lawyers in this country to meet the legitimate demand for these services.

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[1] All citations to Appendix are to the Appendix to the Petition for Certiorari.

> One reason for the paucity of lawyers handling civil rights matters is that these cases must be prosecuted on a contingent fee basis as opposed to an hourly fee basis because most of the plaintiffs do not have the money to fund a major lawsuit.
>
> A second discouraging factor is that proving such cases is difficult because one must prove the "state of mind" of the defendant.
>
> Further, it is the general perception of the legal community with whom The League works that courts are reluctant to award substantial fees in Title VII cases. Thus, these attorneys believe these cases are too risky and, even if successful, likely to be unrewarding.
>
> The League's experience is that this vacuum is not being filled by the EEOC to any substantial extent.
>
> To adequately increase the availability of knowledgeable practitioners in this area, it is necessary to ensure that attorneys who take complicated Title VII cases are compensated not simply for the hours they put in, but also for the risks they have had to bear during the lawsuit. (Jacob Aff. pp. 4-5)

Bruce Elfvin, then Assistant General Counsel of the Equal Employment Opportunity Commission, attested to the same facts:

> My experience is that less than vigorous prosecution of Title VII cases by private counsel is commonplace. I believe that this is true for two factors, among others. First, the fee awards have generally not been sufficient to compensate private counsel for the risk of these cases. Hence, many knowledgeable counsel have left the field. Second, because so few attorneys have been able to make a living on the plaintiff's side of Title VII cases, few really knowledgeable and experienced lawyers are attracted to or remain in the field.
>
> The reluctance of knowledgeable and experienced lawyers to routinely represent plaintiffs in Title VII

> cases causes enforcement problems for the EEOC. The EEOC has been consistently understaffed in relation to the complexity of tasks and workload it has been charged by Congress to accomplish. Additionally, because of its federal salary structure, it does not retain as many knowledgeable and experienced litigators as it would wish. Thus, the EEOC needs the enforcement assistance of knowledgeable and experienced members of the private bar.
>
> It is my opinion that compensation adequate to attract knowledgeable and experienced attorneys into the employment discrimination field is necessary. Because of the risky nature of Title VII cases, such compensation should include enhanced fee awards to compensate for the risk of losing a particular lawsuit. Otherwise knowledgeable and experienced litigators will look elsewhere for the economic rewards in their profession. (Elfvin Aff. pp. 5-6)

The need for an enhancement for risk if cases such as the instant case are to be brought was further confirmed by testimony provided to the District Court of distinguished attorneys practicing in large and small firms in the relevant market. Thomas Sullivan, former United States Attorney for the Northern District of Illinois, who is now a senior partner in the firm of Jenner & Block, a large Chicago law firm with a substantial reputation for doing *pro bono* work, stated:

> In my opinion and experience, large law firms will not normally make the financial sacrifice to prosecute this kind of racial discrimination suit. Accordingly, if attorneys the caliber of lead counsel are to be attracted to this kind of law enforcement litigation, the compensation they receive should adequately reflect the risk undertaken. Therefore, a substantial multiplier or premium should be added to the hourly rates customarily charged by plaintiff's counsel. (Sullivan Aff. p. 11)

Barrington D. Parker, Jr., of the small New York firm of Parker Ausprite Neesemant & Delhanty, described that although Mr. Parker was on the board of the NAACP Legal Defense and Education Fund, his firm had made a policy decision not to become involved in cases such as this one because they are too risky.[2]

Indeed, the testimony of the witnesses was unanimous that risk multipliers were essential to attract competent counsel into the field of large, multi-party civil rights cases such as this. *Burlington Northern offered no contrary testimony.*

Thus, this case surely was one which "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.' " 55 U.S.L.W. at 5120 (concurring opinion of Justice O'Connor)

Although abundant evidence on the subject was offered, neither the District Court nor the Court of Appeals analyzed this case to determine whether a risk multiplier was necessary to enable plaintiffs to find competent counsel for this case. Indeed, the trial court refused even to entertain evidence that an enhancement was necessary to attract competent counsel to this case and others like it, announcing that any such notion was demeaning to the bar:

> You mean to tell me lawyers—are you telling me the legal profession has gotten to the point that unless there is a multiplier in fee rates, competent conscientious lawyers will not undertake cases? . . .

---

[2] Even Burlington Northern's expert, Professor Steven Shavell, admitted in his deposition that enhanced compensation must be paid for undertaking risk if enforcement of the civil rights laws is not to be left in large part to charity. (Lead Counsel's Ex. 4, Shavell Dep. Tr. 54-55, 113-15, 136)

> I won't sit here and hear the profession demeaned in this way![3] (Transcript of Proceedings, Tr. 322-23)

Based upon this feeling, and in complete disregard of the uncontroverted evidence in the record on this issue, the trial court expressed its personal opinion as a judicial finding:

> It is unpleasant, even painful, for it to disagree with [plaintiffs'] witnesses but the court must. It must say it is just not true that unless lead counsel are given the 2.5 multiplier they request in this case, competent lawyers in Title VII cases will be discouraged from undertaking representation of persons with such civil rights grievances. Those who think so either do not know or remember the history of the struggle for equality under law in this country or they have no faith in the stamina and potential of American lawyers to come forward and vindicate, in the courts, the claims of those whose civil rights have been violated.[4] (App. C-30)

The Seventh Circuit chose not to endorse the District Court's feelings that petitioners' request for an enhancement demeaned the bar. Instead it first noted that it was uncertain about where to go with respect to a multiplier:

> Until [the Supreme Court] issues an opinion on that question, therefore, we are left with some uncertainty regarding the wisdom of risk multipliers. (App. A-11)

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[3] Paradoxically, the District Court stated during the hearing that it would assume that it was difficult to find competent counsel to represent plaintiffs in the field of employment discrimination. (Transcript of Proceedings, Tr. 321-22) The District Court, however, gave no weight to this assumption. As *Delaware Valley* makes clear, the difficulty of finding counsel for this type of case was one of the central questions before the trial court in making its determination of whether a risk enhancement was needed, and petitioners fully met their burden on this question.

[4] In support of this conclusion the trial court cited no evidence—Burlington had provided none—but instead ostensibly relied upon

(Footnote continued on following page)

Nevertheless, the Court of Appeals decided an enhancement should not be granted in this case on the basis of the following analysis:

> Even in the absence of questions concerning the propriety of risk multipliers, we would consider dispositive the district court's finding that this case involved factual complexities and difficulties of trial preparation, but not the kind of significant risk engendered by having to rely on new legal theories of recovery or new remedies. (App. A-12)

Petitioners sought a rehearing, pointing out that risk multipliers had generally not been limited to only those situations where a plaintiff had to rely on new legal theories for recovery or new remedies.

In response, the panel issued an opinion that failed to clarify whether it had given any consideration to the issue whether a risk multiplier was appropriate:

> In this case, the district court did not find that the plaintiffs' success was exceptional within the meaning

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[4] *continued*
the fact that other counsel had filed individual Title VII cases at various times in different sections of the country, which Burlington had moved to have consolidated by the multi-district panel. In making this observation, however, the trial court simply ignored the fact that none of these consolidated cases were class actions and, with isolated exceptions here and there, none of the plaintiffs' counsel played any role in the class action proceedings, but simply rode lead counsel's coattails. Indeed the dearth of lawyers jumping on lead counsel's bandwagon shows how different the civil rights "market" is from the securities or antitrust "market" where, after indictments, huge numbers of plaintiffs' firms will volunteer for positions of leadership in the subsequent class action. Moreover, the District Court clearly could not properly rely upon the fact that some attorneys were willing to file related individual Title VII cases at the time this class action was initiated. Given the law regarding risk enhancement at that time, attorneys naturally acted in the belief that they would be compensated for undertaking risk if they prevailed.

> of *Blum*, and in the absence of evidence to demonstrate that this finding was an abuse of discretion, we were constrained to follow *Blum* and affirm the district court's judgment. In so deciding, we did not address whether the lodestar amount should ever be adjusted upward to compensate for the risk of loss. Neither did we address whether, assuming this type of adjustment is legitimate, the use of a multiplier is an appropriate means to achieve this purpose. These questions remain open in our circuit. *See Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986). We look to the decision in *Delaware Valley* to shed more light on this area. (App. B-3)

This passage suggests that the Seventh Circuit made no decision on the issues raised by petitioners' request for a risk multiplier and their supporting evidence that was framed precisely in the terms of the standards announced in *Delaware Valley*. It is clear that the only standard applied by the District Court to deny a risk multiplier was its conclusion that plaintiffs had not utilized new or novel legal theories and it appears that the Seventh Circuit only decided that petitioners' exceptional success did not warrant a multiplier.

The plurality opinion in *Delaware Valley*, and Justice O'Connor's concurrence, now make clear that such an analysis was wrong with regard to the question whether petitioners were entitled to a risk multiplier. Moreover, the dissenting opinion would only utilize such an analysis to determine if an additional multiplier was warranted. The lower courts, thus, never addressed the proper issues.

CONCLUSION

Certiorari should be granted. This is a particularly good case for review. It presents the risk enhancement issue in its most pristine form. Here plaintiffs' counsel undertook a seven year struggle at great personal risk, and persisted in prosecuting the class action to a successful conclusion despite increasing risk. Since there was no means of mitigating the risk by, for example, signing a contingency agreement with the plaintiffs, their fees were wholly in the hands of the court. This is especially true because such a large part of the relief that petitioners achieved in this case flowed from the provisions of the Consent Decree that required reinstatement, hiring, promotion and training of black employees. At the conclusion of this proceeding, the District Court awarded plaintiffs' counsel less per hour than they would have made had they taken a risk-free case and been paid on a regular, monthly basis. No one but a saint will take a case like this in the future if that is the best they can expect and, however one reads the legislative history, it is clear that Congress wanted cases like this one brought.

Respectfully submitted,

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